

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT LOTT,

Plaintiff-Appellant,

and

LINDA LOTT,

Plaintiff,

v

CITY OF BIRMINGHAM,

Defendant-Appellee,

and

CITY OF BLOOMFIELD HILLS,

Defendant.

UNPUBLISHED

February 6, 2014

No. 307692

Oakland Circuit Court

LC No. 2011-120787-CZ

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs Linda and Robert Lott brought this declaratory judgment action to obtain a declaration that certain city ordinances are partially void because they prohibit conduct allowed under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.* Plaintiff Robert Lott appeals as of right from the trial court's order dismissing plaintiffs' first amended complaint, which sought declaratory relief with respect to ordinances in the cities of Birmingham and Bloomfield Hills. The trial court ruled that no actual controversy existed for it to decide.¹ Only the Birmingham ordinance is at issue in this appeal. The claim involving the Bloomfield Hills ordinance was asserted only with respect to plaintiff Linda Lott. We affirm.

¹ We note that plaintiff Robert Lott represents in this appeal that Linda Lott passed away.

This appeal involves ordinances adopted by the city of Birmingham, as set forth in §§ 1.9 and 1.18 of the Birmingham City Code to establish criminal penalties for violations of federal, state, or local laws. Section 1.18 (Ordinance No. 2026; dated April 26, 2010) provides:

It shall be unlawful for any person or business to engage in any activity, conduct, use or venture in the city that is contrary to federal, state or local laws or ordinances, including violations of this Code or the city zoning ordinance, and any statutes and codes adopted or utilized by the city.

Section 1.9 (Ordinance No. 2063; dated April 11, 2011) provides, in pertinent part:

(a) Whenever in this Code or in any rule, regulation or order made pursuant to this Code or any ordinance of the city, any act is prohibited or is made or declared to be unlawful, the violation of any such provision by any person shall, upon conviction, be punished by a fine not exceeding \$500.00, and/or a term of probation, and/or imprisonment for a term not exceeding 90 or 93 days, except whenever a specific penalty is otherwise provided.

* * *

(d) In addition to any penalty under this section, the city may seek injunctive relief, abate the condition as a nuisance, revoke any permit or license, and/or seek any other available remedy.

In an amended complaint filed in January 2011, plaintiffs alleged that they are qualified medical-marijuana² patients under the MMMA and registered as such with the state. Plaintiffs sought a declaratory judgment that the city of Birmingham's ordinances were partially invalid because they conflicted with the MMMA by, in effect, prohibiting and penalizing activity that is contrary to federal law, thereby making it illegal for them to use medical marijuana in their home.

In August 2011, plaintiffs moved for summary disposition under MCR 2.116(C)(10) and for declaratory relief pursuant to MCR 2.605 with respect to their claims. The city of Birmingham filed a cross-motion for summary disposition under MCR 2.116(C)(8) and (10), seeking a determination that the MMMA is preempted by federal law and, therefore, without effect. The trial court, after determining that it had discretion whether to grant or deny declaratory relief under MCR 2.605, denied any declaratory relief based on its determination that there was no actual controversy for it to decide. On appeal, plaintiff Robert Lott challenges this determination relative to his claim involving the city of Birmingham's ordinances. While we

² Although the complaint and the MMMA use the spelling "marihuana," the more common spelling "marijuana" is used in this opinion. See *Ter Beek v City of Wyoming*, 297 Mich App 446, 450 n 1; 823 NW2d 864 (2012), lv gtd 493 Mich 957 (2013) (likewise using the more common spelling "marijuana").

find merit to Robert Lott’s argument that an actual controversy existed, we conclude that appellate relief is not necessary.

A trial court’s decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 624 (2007). In granting summary disposition in favor of the city of Birmingham, the trial court stated, “[t]he Court, in its discretion, denies the request for declaratory relief for the reason that no actual controversy exists here for the Court to decide.” In this case, the trial court erred to the extent it determined that it had discretion to deny declaratory relief based on the “actual controversy” language in MCR 2.605.

A party’s entitlement to declaratory relief is governed by MCR 2.605(A)(1), which provides:

In a case of *actual controversy* within its jurisdiction, a Michigan court of record *may* declare the rights and other legal relations of an *interested party* seeking a declaratory judgment, whether or not other relief is or could be sought or granted. [Emphasis added.]

This rule does not limit or expand a court’s subject-matter jurisdiction, but rather is concerned with issues of standing, ripeness, and mootness. *Int’l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Where a litigant meets the requirements of MCR 2.605, the litigant has standing to seek a declaratory judgment. *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Whether a party has standing is a question of law that is reviewed de novo by an appellate court. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

By comparison, the existence of an actual controversy is generally required for litigation because judicial power is the right to decide actual controversies between adverse litigants, which are initiated in a court of proper jurisdiction. *Anglers of AuSable, Inc v Dep’t of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011). Under MCR 2.605, the existence of an actual controversy is a condition precedent for the litigant to invoke declaratory relief. *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). Although this Court, relying on the permissive “may declare” language in MCR 2.605(A)(1), has indicated that a trial court may exercise discretion in determining whether there is an actual controversy, *City of Lake Angelus v Aeronautics Comm*, 260 Mich App 371, 377; 676 NW2d 642 (2004), our Supreme Court stated in *Allstate Ins Co v Hayes*, 442 Mich 56, 66-74; 499 NW2d 743 (1993), that the actual controversy requirement in MCR 2.605 is distinct from the court’s discretionary determination, explaining:

Properly understood, however, the actual controversy requirement is simply a summary of justiciability as the necessary condition for judicial relief. Thus, if a court would not otherwise have subject matter jurisdiction over the issue before it or, *if the issue is not justiciable* because it does not involve a genuine, live controversy between interested persons asserting adverse claims, the

decision of which can definitively affect existing legal relations, *a court may not declare the rights and obligations of the parties before it.*

* * *

Assuming the existence of a case or controversy within the subject matter of the court, the determination to make such a declaration is ordinarily a matter entrusted to the sound discretion of the court. Moreover, in exercising its discretion, the court must keep in mind the purposes to be served by a declaration of rights. [Emphasis added; citations omitted]

Based on *Allstate Ins Co*, it is only after an actual controversy is established that a trial court has discretion to declare the parties' rights. Therefore, as indicated in *Kircher v City of Ypsilanti*, 269 Mich App 224, 226-227; 712 NW2d 738 (2005), a de novo standard of review applies to the determination whether there is an actual controversy. If an actual controversy exists, the trial court may exercise discretion whether to grant declaratory relief. "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Reviewing de novo the question whether an actual controversy existed with respect to plaintiff Robert Lott's request for declaratory relief, we conclude that the trial court erred in finding that there was no actual controversy for it to decide. In *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America*, 295 Mich App at 495, this Court set forth the following standards for determining whether an actual controversy exists in a case:

An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. The requirement prevents a court from deciding hypothetical issues. However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred. The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an "adverse interest necessitating the sharpening of the issues raised." [Footnotes with citations omitted.]

Plaintiff Robert Lott's request for declaratory relief was based on an alleged conflict between the city of Birmingham's ordinances and MCL 333.26424(a)³ of the MMMA, which

³ As amended by 2012 PA 512, effective April 1, 2012, the immunity provision in MCL 333.26424(a) provides:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing

functions by providing medical-marijuana patients with immunity from arrest, prosecution, and penalty.⁴ See *People v Koon*, 494 Mich 1, 5; 832 NW2d 724 (2013). The essence of plaintiff Robert Lott's claim was that the city of Birmingham's ordinances conflict with the MMMA's immunity provision by subjecting activity that is permitted under the MMMA, but contrary to federal law, to an arrest and penalty under the city's ordinances.

In finding no actual controversy, the trial court determined that the impact of Ordinance No. 2026 on plaintiffs would be hypothetical because the MMMA provides sufficient guidance to allow them to determine whether their medical marijuana use complies with the MMMA, and that the MMMA would not shield plaintiffs from a "federal prosecution." Because the trial court failed to consider the penalties established by Ordinance No. 2063 for a violation of the city of Birmingham's code of ordinances, and failed to address whether the penalty provision presented an actual controversy, despite the parties' dispute whether it could be enforced in light of the parties' differing preemption arguments, the trial court erred in determining that there was no actual controversy. In light of the circumstances presented to the trial court when it rendered its decision, plaintiff Robert Lott had pleaded and established an adverse interest necessitating the sharpening of the issue raised. It was not necessary for Robert Lott to wait until an actual arrest for violating Ordinance No. 2026 to seek declaratory relief. *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America*, 295 Mich App at 495. Therefore, we disagree with the trial court's determination that there was no actual controversy to be decided.

Nonetheless, we reject plaintiff Robert Lott's argument that the appropriate remedy for this error is to have this Court decide the merits of his request for declaratory relief. Aside from the fact that the trial court has not yet had an opportunity to exercise its discretion under MCR 2.625 in light of the actual controversy that was established at the time of its decision, it is clear that the circumstances underlying that controversy have changed. After the trial court rendered its decision, this Court addressed and decided the state and federal preemption issues underlying the controversy in this case in the context of a similar city of Wyoming ordinance. See *Ter Beek v City of Wyoming*, 297 Mich App 446; 823 NW2d 864 (2012), lv gtd 493 Mich 957 (2013). This Court's decision in *Ter Beek* should provide adequate guidance for plaintiff Robert Lott's

board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.

⁴ The MMMA also functions by establishing the medical purpose for using marijuana as a defense to a prosecution involving marijuana. MCL 333.26428; see also *People v Bylsma*, 493 Mich 17, 22; 825 NW2d 543 (2012).

future conduct with respect to the city of Birmingham's ability to enforce its ordinance's penalty provision, thus, the trial court's erroneous determination that there was no actual controversy is harmless. Stated otherwise, a remand to provide the trial court with an opportunity to properly apply MCR 2.605(A)(1) to the present circumstances is not warranted because, in light of this Court's decision in *Ter Beek*, failure to take this action is not inconsistent with substantial justice. MCR 2.613(A).

Affirmed.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra